The Escape in the Romanian Law

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Abstract: This paper aims at examining the escape offense through the perspective of the new incrimination introduced in the Romanian law along with the adoption of the New Criminal Code. The paper focused primarily on examining the constitutive content of this offense, as well as on highlighting the changes made in the already existing text from the previous law. The research also shows the differentiating elements between the two laws, which are useful in the judicial practice in the process of individualization of the criminal law penalty that is to be applied by the court. The novelty elements are the examining of the offense, as well as the evolution of the incrimination in the Romanian law. The research can be useful for students enrolled in law faculties, as well as to law practitioners.

Keywords: Offense; objective aspect; subjective aspect; legal precedents

1. Introduction

The escape offense is part of the group of offenses against the fulfilment of justice and it consists in the deed of a person that is legally retained or detained and who escapes.

The deed is considered to be more severe, being consequently penalised, if the escape is committed through the usage of violence or of weapons.

Given the concrete modalities of executing an imprisonment penalty that may favour the escape offense, the law maker considered it necessary to exemplify other assimilated modalities to commit this offense, such as the unjustified failure to be present at the detention place, at the expiry date of the period in which the person was legally free and the unauthorized leaving of the workplace that is outside the detention place.

A special mention regards the penalty system that implies that the applied penalty for the escape offense is added to the rest of the penalty that is not executed at the date of the escape. The attempt is punished in both cases of normative modalities.

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2. The Criminal Code in force Compared to the Previous Law

The examined offense was mentioned, with the same marginal name in the Criminal Code of 1969 at art. 269, with a legal content that present slight differences in relation to the provision in force.

Thus, among the differentiating elements we mention the following:

- the new incrimination does not provide the aggravated normative modality consisting in the performance of the offense by two or more persons together, nor the performance of the deed by usage of other instruments;

- the new incrimination has been added with two assimilated normative modalities that will be retained if the active subject unjustifiably does not show up at the detention place, at the expiry of the period in which he was legally free or if the leaves, without authorisation, the workplace outside the detention place;

- the sentencing regime is harsher in the new law in the case of the typical normative modality and milder in the case of the aggravated normative modality (imprisonment from 6 months to 3 years and imprisonment from 6 months to 2 years in the case of the typical normative modality and imprisonment from one to 5 years and imprisonment from 2 to 8 years in the case of the aggravated normative modality).

As continuity elements, we mention the marginal title and the provisions of the typical normative modality.

3. Pre-existing Elements

3.1. Legal matter

The special legal matter is made up of the social relations regarding the activity of fulfilment of justice that include, this time, also the obligations of persons submitted to measures of retention or detention.

3.2. Material Object

Generally, the examined offense does not have a *material object,* but, in the case of committing the offense through acts of violence, we will have a *material object* that identifies with the body of the person on which the violence has been exerted.

3.3. Offense Subjects

The active subject of the offense is the suspect or the respondent which is in the state of retention or detention.

The active subject of this offense can also be the person in relation to which a form of international judicial cooperation in criminal matter is in force (such as the case of extraditions, the European arrest warrant, the transfer of the convicted person following the recognition of the conviction sentence issued by the competent judicial institutions of the Romanian state or of another European Union member state or even by a third state).

According to recent doctrine, the following categories of persons cannot be direct active subjects of the escape offense:

"- the perpetrator deprived of liberty as a consequence of being caught after committing a flagrant offense;

- the medically committed person[1];

- the person brought by constraint based on a warrant for arrest;

- the person that is administratively led to police headquarters;

- the person (minor or of legal age) committed in an education centre or in a detention centre[2];

- the person deprived of liberty after the lawful end of the arrest measure or of remand custody or after the full execution of the sentence, or after the sentence was considered to be executed;

- the house arrested respondent (the failure to comply with the house arrest measure entails the possibility to replace this measure with remand custody, and not the assimilation with escape offense)" (Udroiu, 2017, p. 426).

We appreciate that the active subject of this offense cannot be the person against whom the remand custody measure has been disposed, if this measure was prolonged after the arraignment, but the preliminary court judge has not verified this measure within 30 days.

Criminal participation is possible as instigation.

Complicity is possible, but it fulfils the constitutive elements of the offense regulated distinctly in the provisions of art. 286 C.C. (Escape facilitation).

[1] If the medically committed person leaves the hospital in which he is placed wihtout right, the offense of not executing criminal sentences will be retained provided at art. 288 alin. (1) NCP.
[2] If the minor escapes from an education centre or from a detention centre the offense of not executing criminal sentences will be provided at art. 288 alin. (1) New Criminla Code.

Concerning the possibility of committing the offense in joint enterprise, two different opinions have been promoted in the doctrine.

The first claims the possibility of retaining the joint enterprise, with the example of two or more persons escaping together, these may be, as applicable, co-authors or authors/co-authors and concurrent accomplices (Udroiu, 2017, p. 426).

In the same sense, another author claims that participation is possible as joint enterprise (Dobrinoiu V., in Dobrinoiu, et alli., 2016, p. 484).

Another opinion claims that "Being an offense *in persona propria*, since the obligation to comply with obligation to maintain a state of custody or detention is incumbent upon each person that may be in such a situation, joint enterprise is no longer possible; consequently, if several persons escape together, each person will be author of his own offense" (Andra – Roxana Trandafir, in Rotaru, Trandafir, Cioclei, 2016, p. 174).

The passive subject is the state as owner of socially protected value. If violence is used, *the secondary passive subject* can be the person against which violence has been used.

The place and the time of committing the offense present certain relevance for its existence.

Thus, the active subject escapes from certain places such as penitentiaries, detention centres of police units etc. Also, concerning the time, the active subject escapes during the time in which he is legally in custody or detained.

4. Judicial Structure and Content of the Offense

4.1. Prerequisite

The prerequisite consists in the pre-existence of a state of legal deprivation of liberty in which the active subject is found, as a consequence of being held in custody, remand custody or execution of an imprisonment sentence or life imprisonment sentence.

Also, *the prerequisite* may also consist of the pre-existence of a judicial procedure of executing a form of international judicial cooperation in criminal matters, with the suspect or the respondent being in remand custody or executing a criminal sentence depriving him of liberty.

Also, the prerequisite can be not only the execution of a European arrest warrant, as claimed in the recent doctrine (Andra – Roxana Trandafir, in Rotaru, Trandafir, Cioclei, 2016, p. 176), but also the execution of any form of criminal international judicial cooperation forms, as showed above (extradition, transfer of sentenced persons).

The pre-emptive measure of house arrest is not incident in this case, the law maker only referring to the above mentioned situations.

In the recent doctrine, it has been claimed that "In the Criminal Procedure Code, the two notions (the notions of *custody* and detention are referred to – s.n.) are only used in connection with the three above mentioned situations (custody, remand custody and the execution of an imprisonment sentence or of life imprisonment sentence are taken into consideration– s.n.). Therefore, it cannot be claimed that a person who is in house arrest is *detained.* At the same time, we must consider that, at the time of the adoption of the Criminal Code, the Criminal Procedure Code had not been adopted, which introduced in our legislation the pre-emptive measure of house arrest. The typical form of the offense, as conceived by the criminal law maker in 2009, thus sanctions the escape committed by a person that is at the disposal of judicial institutions that is in their custody, where they are being kept *under permanent guard.* In support of the solution we embrace (Udroiu, 2017, p. 319), the doctrine also showed the fact that, according to art. 221 par. (1) C. proc. pen., the breach of the measure of house arrest may entail its replacement with the measure of remand custody, which already is the choice of the law maker for that particular deed (the author also shows that a contrary solution would raise issues in regard to the principle *ne bis in idem)*(Stoica, www.juridice.ro). Consequently, if the law maker wants to include this pre-emptive measure among those that constitute the prerequisite of the offense, he must do so explicitely through a law for the modification of the Criminal Code" (Andra – Roxana Trandafir, în Rotaru, Trandafir, Cioclei, 2016, p. 176).

Also, the escape offense will not be retained in the following situations:

- leaving the hospital without having the right to do so by the medically committed person as a consequence of the safety measure of medical commitment based on the provisions of art. 110 Criminal Code; in this case, the provisions of art. 288 par. (1) Criminal Code will apply;

- leaving, without having the right to do so, the education centre or the detention centre in which the person was committed as education measure, based on the provisions of art. 124 and 125 Criminal Code; in this case, the provisions of art. 288 par. (2) Criminal Code will apply;

- absconding a person from the guard of the police leading that person to the judicial institutions based on a warrant for arrest, since the law maker does not assimilate the time of taking the person to judicial institutions with the period of the arrest;

- a person fleeing while he is being taken to judicial institutions after being caught as a consequence of committing a flagrant offense;

- a person fleeing from the police leading him to the headquarters of the institution, as administrative measure;

- absconding a person after the expiry of the legal arrest or remand custody period.

4.2. Constitutive Content

4.2.1. Objective Aspect

The material element of the objective aspect in the case of the typical normative modality is accomplished by the escape action of a person that is retained or detained or by the unjustified omission of the convicted person to be present at the detention place, at the expiry of the period in which he was legally free or through the action of leaving, without authorisation, by the convicted person, the workplace that is outside the detention place.

In the sense of the criminal law *to escape* means to leave, without the right to do so, the detention place through which is replaced „in fact the legal state of liberty deprivation with the illegal state of liberty"(Tudorel Toader, Marieta Safta in, George Antoniu, Tudorel Toader (coordonatori), Versavia Brutaru, Ștefan Daneș, Constantin Duvac, Ioan Griga, Ion Ifrim, Gheorghe Ivan, Gavril Paraschiv, Ilie Pascu, Ion Rusu, Marieta Safta, Iancu Tănăsescu, Tudorel Toader, Ioana Vasiu, 2016, p. 149).

Another opinion shows that the action of *escaping* "means escaping from deprivation of freedom to which a person is submitted by willingly and illegally leaving the detention place or by escaping from supervision to which the person is submitted in a state of custody or detention.

The escaping action is committed both when the person in custody or detained escapes from a place for persons that are in custody or detained (eg. penitentiary, disciplinarian military unit), as well as when the person escapes from escort"(Nicoleta Iliescu in, Dongoroz et. alli. 1972, p. 260).

The expression person in a legal state of detention means a person against which a habilitated judicial institution (the prosecutor or the criminal investigation organs) has ordered the measure of custody in accordance with the provisions of art. 209 and 210 c. proc. pen.

The legal state of detention involves the situation of a person that is under the power of a mandate for the execution of the imprisonment decision or life imprisonment or of a remand custody mandate issued by a judicial institution of Romania or another judicial institution of another state (that has been recognized and is in execution by Romanian judicial institutions).

We also appreciate that the lawmaker should intervene to add to the text of par. (1) of art. 285 Criminal Code, by explicitly mentioning the pre-emptive measure of freedom deprivation of remand custody, after the notion of *detainment",* so that the text is clearer and so that certain interpretations are in accordance with the law maker's intention.

Regarding *escaping from custody or detainment* in legal practice it was decided that "the deed of the respondent to escape from the legal state of detention, or remand

custody, while escorted by police forces, fulfils the constituting elements of the escape offense (*County Court. Bucharest, Second Criminal Section, decision no. 129/1996,* in C.P.J.P. 1994-1997, p. 54) or that, in case the two prisoners that are guarded are involved in agricultural works, they leave the work point in turns, 15 minutes apart, with the permission of the guards, to go to the neighbouring plot of land to meet a person that is there, after which they both leave with the car driven by that person, leaving the detention place, they commit the escape offense in aggravated conditions mentioned at art. 269 par. (2) Criminal Code Of 1969. In such a situation, the escape is committed by the two prisoners together; the circumstance that they left the work point at a different time is irrelevant *(C.S.J., Criminal section, decision no. 3966/2001,* in B.J. – C.D. 2001, P. 224). This latter example is typical for what a transitory situation means in regard to the deed committed by two persons. If it would have been judged under the authority of the new law, the respondents would have answered in accordance with the new law, which is more favourable, and the deed of each person would have been framed in the provisions of art. 285 par. (1) Criminal Code" (Georgiana Bodoroncea, in Bodoroncea, et. alli., 2016, p. 855).

To complete the objective aspect it is necessary to fulfil the *essential requirement* that involves the state of custody or detention is *legal.*

This means that the active subject is submitted to the power of a custody order, of a pre-emptive remand custody mandate issued by Romanian or foreign authorities or of a mandate for the execution of a punishment issued by the competent Romanian or foreign court.

If the person is submitted to the power of a pre-emptive remand custody mandate or for the execution of a freedom deprivation measure issued by a competent judicial institution of another European Union member state or of a third country, the essential requirement will only be fulfilled if that case is in the execution of a procedure mentioned in a form of international judicial cooperation in criminal matters, in accordance with the provisions of the special Romanian law and of international judicial instruments to which Romania is part of and the active subject, at the time of committing the deed, is on Romanian territory.

Escaping by *unjustified failure to show up at the place of detention, at the end of the period in which the person was legally free* refers to the deed of the convicted person that, after being granted permission in the terms mentioned in art. 99 of the Law no. 253/2013 regarding the execution of punishments and freedom deprivation measures[1], does not show up at the detention place at the end of the period in which he was in a legal state of freedom (referring to the period of the permission granted according to the law).

[1] Published in Romania's Official Journal, Part I, no. 514 of 14 August 2013.

For the existence of the offense it is necessary to also fulfil the essential requirement that involved that the active subject did not show up *without justification* at the detention place at the date and at the time of the expiry of the permission period.

The deed will be typical both if person does not show up at the detention place and escapes from the execution of the punishment, as well as if he is unjustifiably late, arriving after the hour mentioned in the document that ordered the permission.

The typical criteria is not met if the failure to show up is justified by objective reasons, such as natural calamities (fires, explosions, blocking access etc.), being involved in an accident etc. Even in such a case, we appreciate that the person is obligated to announce by telephone the objective reason for being late.

Escaping by leaving, without authorisation, by the convicted person, the workplace outside the detention place, involves that the convicted person left, without authorisation from the workplace outside the detention place. Leaving may mean leaving the place for just a few minutes or escaping from the execution of the punishment (the convicted person flees the site).

To complete the objective aspect it is necessary to have two other *essential requirements.*

The first *essential requirement* is that the person leaves that place, without authorisation from the competent person. If that authorisation from the competent person exists, the deed does not fulfil the typical conditions of the examined offense.

The second *essential requirement* is fulfilled when the workplace left by the active subject is outside the detention place.

We mention that, for the existence of the offense, both essential requirements must be fulfilled.

In legal practice, „the fulfilment of the material element is accomplished in this variant in the case of the deed of the respondent "that, on the 22.09.2009, around 14:20, being in the state of execution of a punishment depriving him of freedom in the Bucharest-Jilava Penitentiary, escaped from his work place situated in the city P., Ilfov County [*C.A. Bucharest, Second Criminal Section, criminal decision no. 1007 of 17 September 2014 (www.rolii.ro)]*" (Georgiana Bodoroncea, in Bodoroncea, et alli., 2016, p. 856).

In the case of the aggravated normative modality mentioned in the provisions of art. 285 par. (2) Criminal Code, *the material element* of the objective aspect is fulfilled by the *use of violence or by the use of weapons.*

Concerning the expression *use of violence* we mention that, in the current language, violence means use of force and constraint by an individual, group or social class for the purpose of imposing one's will on others.

Physical violence concerns the use of force for the purpose causing physical suffering, and *psychical violence* refers to the use of a language that negatively influences the developing personality of a person.

Starting from these general definitions, it can be appreciated that by *using* violence, in the sense wanted by the lawmaker, we refer to the action of the person in custody or detained that, during the escape, uses force and constraint or uses language that negatively influences the behaviour of persons, in order to intimidated them to facilitate the wanted purpose (to escape).

Undoubtedly, both physical, as well as psychical violence can be directed towards the guard staff (employees of the penitentiary or of the Ministry of Internal Affairs), and also towards other natural persons that are trying to prevent the escape of another person.

Using *weapons* refers to the use by the active subject of a weapon in order to intimidate the guard staff or other persons that are trying to prevent the escape of another person, during the escape.

The term *weapons* is pretty vast, this category includes all categories of weapons mentioned in the Law no. 295/2004 regarding the regime of weapons and ammunitions with all amendments and additions[1], as well as white weapons.

Thus, according to the provisions of art. 2 p. 1 of the special law, the term weapon represents any object or device whose functioning determines throwing one or several projectiles, explosive substances, lit or illuminated, fire mixes or spreading toxic, irritating or neutralizing gas, if it can be found in one of the categories included in the appendix.

Concerning the expression *white weapon,* we mention that this refers to a weapon used in combat, being that object or device that can harm the health of bodily integrity of persons by cutting, hitting, poking, such as: machete, bayonets, swords, rapiers, daggers, knives, shanks, boxes, crossbows, arches, bats, telescopic canes.

In our opinion, in order to acknowledge the existence of an aggravated modality it is not necessary that the person, in the process of escaping, uses the weapon as such (in the sense of shooting a gun or stabbing with a knife or another sharp object), being necessary that the manner in which it is held, it may be noticed and it may give the guard staff or another person the feeling that the fugitive, if prevented from escaping, will use those weapons.

We appreciate that it can be interpreted as action of using a weapon the action of threatening or pointing a weapon at the guard staff or at other people.

For the existence of the offense, in this modality, it is necessary to fulfil also an *essential* requirement that says that violence as such must be used during the escape

[1] Republished in Romania's Official Journal, Part I, no. 425 of 10 June 2014.

and weapons too must be used during the escape (held ostentatiously with the obvious intention to be seen by the guard staff or by other persons and to inspire fear that they will be used if the fugitive is prevented from reaching his goal).

The immediate consequence in both normative modalities is to create a state of danger for the activity of justice accomplishment.

The causal connection results from the material of the deed *(ex re)*, thus it is not necessary that the judicial institutions prove it.

4.2.2. Subjective Aspect

The guilt form with which the offense is committed is *direct* or *indirect intention.*

Legal practice acknowledged that there is direct intention "since the respondent foresaw and intended to breach social relations regarding the fulfilment of justice, in the context in which he knew that he was in a legal state of detention as a consequence of his final conviction through the Criminal Decision (…) of the County Court (…) he was warned even by the witness (…) and he was at his workplace under supervision" (Andra – Roxana Trandafir, in Rotaru, Trandafir, Cioclei, 2016, p. 178).

As claimed in the recent doctrine, "Indirect intention is easier to imagine in the case of the assimilated variant, if, for example, a person must return to the penitentiary in a certain day, at 14:00, and that person, going to an open air party, leaves his watch and telephone in the car, accepting that it may not comply with the requested time" (Andra – Roxana Trandafir, în Rotaru, Trandafir, Cioclei, 2016, p. 178).

In our opinion, for the typical normative modality mentioned in par. (1) and par. (2) the guilt form under which the offense is committed is only *direct intention*, while in the case of assimilated normative modalities mentioned in par. (3), the guilt form can also be indirect intention.

For the existence of the offense, the *mobile* and the purpose have no legal relevance, but they are important in the complex activity of individualising the criminal justice penalty that will be enforced on the active subject.

5. Conclusions

In the context of the evolution of the operative situation in this field, it was necessary to make certain changes in the legal content of the offense, changes and additions that incriminated another two deeds appeared during the last years.

We are referring to the two new assimilated normative modalities that will be retained if the active subject does not show up, without justification, to the detention

place, at the end of the period in which he was legally free or if he leaves, without authorisation, the workplace outside the detention place.

We should notice the manner in which the Romanian lawmaker reacted by incriminating the mentioned deeds, taking into consideration the concrete modalities of executing a freedom depriving punishment, that may favour committing an escape offense.

The general conclusion that occurs and that results from this research refers to the necessity of incriminating this deed, modifying it in the context of the new transformations brought to the procedures of executing freedom depriving punishments.

Also, it is important to acknowledge the procedure of identification and application of the more favourable criminal law in the context of the modifications made in the legal content of the offense.

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